ROCK HILL FIRE CORPORATION,	)	**AGBCA No. 2005-149-1**
RED ROCK FIRE,	)	**AGBCA No. 2005-150-1**
SUPPORT FIRE SERVICES, INC.,	)	**AGBCA No. 2005-151-1**
FIRST STRIKE/TASK FORCE 1,	)	**AGBCA No. 2005-152-1**
	)	
Appellants	)	
	)	
Representing the Appellants:	)	
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RULING OF THE BOARD OF CONTRACT APPEALS

July 26, 2006

Before POLLACK, VERGILIO, and PARRETTE[1], Administrative Judges.

Opinion for the Board by Administrative Judge Vergilio. Separate opinion concurring in result by Administrative Judge Parrette. Separate opinion concurring in part and dissenting in part by Administrative Judge Pollack.

Opinion by Administrative Judge VERGILIO.

On May 12, 2005, the Board received these appeals filed by Rock Hill Fire Corporation of Duluth, Minnesota (AGBCA No. 2005-149-1); Red Rock Fire of Tower, Minnesota (AGBCA No. 2005-150-

[1] Administrative Judge Parrette, of the Department of Interior Board of Contract Appeals, sits by designation of the Secretary of the Department of Agriculture.

1); Support Fire Services, Inc. of Burnsville, Minnesota (AGBCA No. 2005-151-1); and First Strike dba Task Force 1 of Duluth, Inc. (AGBCA No. 2005-152-1) (contractors). The respondent is the U. S. Department of Agriculture (USDA, Department). The National Interagency Fire Center of the USDA Forest Service, in Boise, Idaho, awarded the underlying contracts in 2002 as part of the National Wildland Fire Engine Service project. The Forest Service exercised options for calendar years 2003 and 2004. The contractors submitted a certified claim to the contracting officer raising two basic propositions.

The contractors contend that the contracts obligated the Government to place orders totaling at least $10,000 with each contractor during 2002. In 2002, the Government placed orders totaling $5,250 with one of these contractors (Red Rock) and no orders with the other three contractors. The three contractors seek $10,000; the other seeks $4,750. The present contracting officer denied the claim, concluding that the contracts obligated the Government to place orders totaling at least $10,000 over the life of the contract; an obligation the Government satisfied.

The contractors also contend that the Government violated the terms of the contracts by placing orders with local fire departments and under cooperative agreements instead of under these contracts. The contractors seek a total of at least $135,381 and $36,020, which they attribute to orders inappropriately placed during the mandatory availability periods in 2003 and 2004, respectively. The contractors seek a total of at least $11,482.50 and $101,620.50, which they attribute to orders inappropriately placed outside of the mandatory availability periods in 2003 and 2004, respectively. To arrive at a dollar figure for relief for each contractor, the contractors apportion the sum, $284,504, based upon the number of engines each had available under contract. The present contracting officer concluded that the Government placed all orders in accordance with the terms of the contracts, as bilaterally amended.

The Board has jurisdiction over these timely-filed appeals pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, as amended. The appeal files, complaints, and answers have been filed and served. The parties have engaged in discovery. A hearing on the merits is set to convene in early August. The Department moves for summary judgment on all issues; the contractors move for summary judgment on the issues relating to orders allegedly placed in violation of the ordering requirements. Each party has replied and responded to the opposing motion and position; the Board received the final submission on July 7, 2006.

The Department maintains that undisputed material facts permit the Board to resolve these disputes. In particular, it contends that the contracts do not guarantee orders of at least $10,000 for each year of the contracts; the Government did not violate the terms and conditions of the contracts when placing orders; and the contractors were entitled to no preference outside of the mandatory ordering periods, such that the contractors are not entitled to relief relating to any order the contractors did not obtain during the non-mandatory periods. The contractors oppose the motion and cross-move for summary judgment on the second basis of the claim, alleging that undisputed material facts compel the Board to conclude that the Government placed orders with entities in violation of the preference provisions of the contracts.

Each contract states: "During the life of this contract (base year, plus any option year), the Government shall place orders totaling a minimum of $10,000." The Board concludes that under the plain language of the indefinite-delivery, indefinite-quantity contracts, the guaranteed minimum total of orders relates to the contract life, as a whole, not the base year and option years individually. Accordingly, when the Forest Service extended the contracts by exercising option years, no contractor was entitled to $10,000 in orders during the base year. This resolution of a question of contract interpretation permits the Board to grant this aspect of the Department's motion for summary relief, and to deny this aspect of these appeals. The alleged contrary understandings of various contractors does not overcome the plain language of the clause, particularly when the understanding is said to arise from conversations over a year before the solicitation was issued, and neither the contractors nor the awarding contracting officer indicate that at the time of award the Forest Service knew of and shared the interpretation now alleged by the contractors.

The parties each seek summary judgment regarding the orders placed during the mandatory availability period. However, the existing record fails to compel a conclusion in support of either position. A completed evidentiary record will permit the Board to make the necessary factual findings that are required to resolve the ultimate questions regarding the orders placed with other than these contractors.

In contrast with the stated preference during the defined mandatory availability periods, the contracts expressly state, "The preference in dispatch priority pertains to the mandatory availability period only." The contracts permit, but do not obligate, the Government to utilize the contracts during the non-mandatory periods. Similarly, the contracts do not obligate a contractor to accept any order placed outside the mandatory period. Therefore, the contractors are not entitled to relief regarding any orders placed by the Government outside of the mandatory availability period. Regarding claims for relief relating to orders placed outside of the mandatory availability period, the Board grants the Department's motion for summary relief and denies the motion and claims of the contractors.

FINDINGS OF FACT

The solicitation and contracts

1. The Forest Service engaged in a negotiated procurement to award indefinite-delivery, indefinite-quantity contracts to obtain commercial items, the services of fire engines (with operators) to be used on a nationwide basis (Exhibit B at 26) (unless otherwise noted, all exhibits are in the appeal file in AGBCA No. 2005-149-1; parallel references to the other appeal files are not here given). The Forest Service issued a request for proposals on May 16, 2002 (Exhibits B, C at 78).

2. With effective dates of July 18, 2002, the Forest Service awarded contracts that are consistent with the terms of the solicitation, as amended (Exhibits B, C, D) (the Government awarded other contracts at different host units). For the host unit located in the Superior-Chippewa National Forests, in Grand Rapids, Minnesota, Rock Hill had three engines under its contract (No. 53-024B-2020); Red Rock had two engines under its contract (No. 53-024B-2-2319); Support Fire had one

engine under its contract (No. 53-024B-2-2321); and First Strike had three engines under its contract (No. 53-024B-2-2300). Each contract is for the given number of engines, to be located within a specified distance of the host unit during the mandatory availability period (MAP), which is April 15 through June 15, and September 15 through November 15. (Exhibits C at 81; D at 94, 101, 108, 116; E at 212.)

3. As awarded, the contracts define various terms, including the following:

> **AGENCY** -- See "Government".
>
> **AGENCY COOPERATOR** -- Tax based entities available through Cooperative Agreement to assist the USFS.
>
> **GOVERNMENT** -- United States Department of Agriculture -- Forest Service (USDA-FS), National Park Service (NPS), Bureau of Land Management (BLM), Bureau of Indian Affairs (BIA), and United States Fish & Wildlife Service (USF&WS).

(Exhibit D at 182 (¶ D.32).)

4. As awarded, the contracts address their scope and describe the work:

> The intent of this solicitation and any resultant contract is to establish indefinite Quantity, Indefinite-delivery Contracts (base plus two option years) for services of Wildland Fire Engines, Type 3-6, (with operators) for use on a nation-wide basis, including Alaska. A Mandatory Availability Period (MAP) is assigned to each line item in the schedule of items during which the engine/resource shall be located within a radius (miles, or hours) of the Host Unit. Engines may be used for the protection and administration of Public Lands, to include but not limited to, preparedness, initial attack, Wildland fire suppression, and mop-up of Wildland fire, Wildland fire rehabilitation, hazardous fuel reduction, prescribed fire application, and other resource project work as needed. The National Contract Engine Contractor is guaranteed preference in use during the Mandatory Availability Period within the Host Unit assigned after Agency and Agency Cooperators and before Emergency Equipment Rental Agreement resources are used.
>
> . . . .
>
> The U.S. Forest Service, the Bureau of Land Management, Bureau of Indian Affairs, Fish and Wildlife Service, and the National Park Service are hereby authorized to use this contract in accordance with the terms and conditions set forth herein.

> Formation of this contract does not preclude the Government from using any Agency or Agency Cooperator owned resources before Contract Engines.

(Exhibit D at 160 (¶ D.1).)

5. As awarded, the contracts contain the following paragraphs under a Dispatching (Ordering) clause.

> A. **APPLICABILITY: Emergency Wildland Fire Suppression:**
>
> When mobilizing National Contract Resources (NCR) within the Host Unit, NCR's will be ordered after agency and agency cooperator resources are mobilized, **but before Emergency Equipment Rental Agreement resources (EERA's).** Each Host Unit Dispatch Center (HUDC) must give dispatch preference to assigned NCR resources BEFORE EERA, and all other private resources not on the National Engine Contract except for other Government contracts where a prior firm commitment has been established. This dispatch preference is a contractual requirement. This dispatch preference is a contractual requirement. [sic--sentence repeated]
>
> Resources acquired from other EERA's to include the Pacific Northwest Interagency Agreements, **are not** considered Agency Cooperator's for the purposes of this contract. Private resources under contract with any State Government are not considered Agency Cooperator's for the purpose of this contract.
>
> Organized Administratively Determined (AD) crews **are** considered Agency resources for the purposes of this contract.
>
> B. **HOST UNIT ASSIGNMENTS**
>
> Each National Contract Resource is assigned to a specific Host Unit Dispatch Center (HUDC). The HUDC is responsible for maintaining the status of each NCR, however, each NCR is responsible to report all changes in availability and position to the assigned Host Unit Dispatch Center within the mandatory availability period (MAP). Outside the MAP when and if the NCR becomes unavailable, it is recommended that he/she report to the HUDC change in status.
>
> During the MAP the NCR is required to be physically located within the radius identified in the schedule of items of their assigned HUDC, unless otherwise assigned on order.
>
> **EXCEPTION: During periods of initial attack the above protocol can be waived when and if the NCR cannot meet date/time requirements.**

The preference in dispatch priority pertains to the Mandatory Availability Period only.

(Exhibit D at 170 (¶ D.10).)

6. As to the contract and performance periods, the contracts state:

> A. CONTRACT PERIOD AND RENEWAL OPTION
>
> The contract period shall extend through December 31, 2002 for the first year. However, at the option of the Government, the contract may be renewed for an additional one-year period, not to exceed two renewal periods provided the Contracting Officer serves notice of renewal at least 30 days prior to contract expiration.
>
> (1) START WORK. The Contractor will be given a minimum of ten days after award before any availability must be provided.
>
> (2) MANDATORY AVAILABILITY PERIOD. The mandatory availability period shall begin on the date stipulated in the Schedule of Items unless the Contracting Officer fails to award the cont[r]act at least 10 days prior to the established date(s) or adjust the period in accordance with paragraph 4.
>
> (3) ADJUSTED. The Mandatory Availability Period may be effective up to 30 days before and may be extended up to 30 days after the published dates in the Schedule of Items.
>
> (4) OPTIONAL USE PERIOD. The Government may order service at any time outside the Mandatory Availability Period or any extensions thereof. Service is subject to acceptance by the Contractor.

(Exhibit D at 159 (¶ C.4).) As specified in the optional use paragraph, this language states that outside of the mandatory availability period, the Government may, not must, place orders with a contractor, which may, not must, accept such an order.

7. Among the provisions in the Dispatching (Ordering) clause, is a Replacement clause, found in the awarded contracts:

> When an incident occurs within the protection responsibilities of the host unit and when the Host Unit's assigned NCR(s) are not available because they are committed to emergency fire suppression activities or project work, the HUDC is permitted to order Private-resources (not on the national contract) until the assigned NCR's become available. When the assigned NCR(s) become available, Private-resources shall be demobilized and replaced by the assigned NCR(s).
>
> The Government is not bound to order replacements when the incident is at or above 80% containment. Replacement shall occur within two operational periods after an NCR becomes available.
>
> **When the HUDC requests resources from other units, or the GACC, NCR's shall have preference in receiving assignments over all other EERA, and Private resources when a NCR can meet the date and time requirement of the resource order. (Amendment 01)**
>
> It is the intent of this contract that the first priority of use of the NCR is emergency fire suppression. However if the NCR accepts an order for project work, the Host Unit is exempt from the above ordering protocols until project completion. However, the Host may release and reassign[] the NCR to fire suppression at the discretion of the Government.

(Exhibit D at 171 (¶ D.10.G).)

8. On standard form 1449 of the contracts, in block 24, under "amount," is the figure of $10,000 (Exhibit D at 97). On a continuation sheet, regarding blocks 19-24, supplies or services and prices/costs, is the following paragraph:

> During the life of this contract (base year, plus any option year), the Government shall place orders totaling a minimum of $10,000 , but not in excess of $5,000,000 . (Also see D.10 for ordering protocol, supplied as consideration having significant business value).

(Exhibit D at 98.)[2]

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[2] A Forest Service-internal request for contract action, dated July 25, 2002, specifies: "Minimum guarantee of $10,000 per engine module awarded." The estimate and document do not suggest that the Forest Service would incur a potential $10,000 annual liability per contract. (Exhibit B at 3.)

Performance

9. During the base year of each contract, the Government did not place orders totaling $10,000 with any of these contractors. The Government placed no orders with three of the contractors, and placed orders totaling $5,250 with Red Rock. For 2002, the Government made no payment to the three contractors, and made payment of $5,250 to Red Rock. (Complaint at 2-3 (¶ 15); Answer at 2 (¶ 15).)

10. With effective dates of January 13, 2003, the Forest Service issued contract modifications, thereby extending the contracts for option period 1, covering the period from January 1, through December 31, 2003. The modifications do not indicate or reference an allocation of additional money under the contract. (Exhibit E at 214.)

11. On March 13, 2003, the Director, Acquisition Management, named a successor contracting officer on these contracts, granting the successor "full authority to administer these contracts to their conclusion" (Exhibit F at 328-29). The new contracting officer informed the contractors of the transition in contracting officers, effective as of March 14, 2003 (Exhibit F at 330).

12. With effective dates of May 29, 2003 (Exhibit E at 215), the parties bilaterally (the modifications required the signature of the contractor) modified the contracts. The Forest Service issued the modifications with the stated purpose "to change some contract specifications." The modifications describe the changes:

> Wording is changed throughout various Sections of the contract to clarify and correct work processes and procedures and the daily rates are increased due to the number of personnel per engine being increased from 2 to 3 persons. See attached pages for the revised Schedule of Services and wording changes (that are underlined) throughout the contract.

(Exhibit E at 215 (¶ 14.1, .2).) The modifications specify that there is no change in the total potential contract value as a result of the modifications; the modifications are silent on any price adjustment under the Changes clause or other contract provision that may arise from the modifications (Exhibit E at 215 (¶ 14.3)). Few of the changes from the signed contract are underlined; changes are apparent only by a reading of the two versions. (Exhibits D at 98-208, E at 216-302).

13. These modifications renumber the Definitions clause, and add an introductory paragraph, without underlining or specifying a change (Exhibit E at 254 (¶ D.30)). This clause does not alter the definition of "agency" or "Government" (Finding of Fact (FF) 3), but does revise the definition of "agency cooperator" (by replacing "Forest Service" with "USDA Forest Service") to read: "**AGENCY COOPERATOR** -- Tax based entities available through Cooperative Agreement to assist the USDA Forest Service." (FF 3; Exhibit F at 254). These modifications revise clause C.4 (FF 6), with the revised final paragraph stating: "(3) OPTIONAL USE PERIOD. Notwithstanding

the above, resource orders issued by the Government at any time outside the Mandatory Availability Period are subject to acceptance by the Contractor." (Exhibit E at 232 (¶ C.4.A).)

14. These modifications reword paragraph D.1, Location and Description & Scope of Contract (FF 4), to the following:

> The intent of this solicitation and any resultant contract is to establish multiple Indefinite-delivery, Indefinite-Quantity contracts (base plus two option years). The intent of this solicitation and any resultant contract is to establish services for Wildland Fire Engines, Type 3-6, (with operators) for use by Host Units. A Mandatory Availability Period (MAP) is assigned to each line item in the Schedule of Services. Engines may be used for the protection and administration of Public Land fire suppression, fire severity (including fire readiness), and related project work needing the use of an engine, such as prescribed fire application. The work may be performed for any USDA Forest Service or cooperating Government or State Agency requiring the use of an engine. . . . .
>
> The U.S. Forest Service, (FS) and it's [sic] cooperators, i.e., the Bureau of Land Management, Bureau of Indian Affairs, Fish and Wildlife Service, and the National Park Service, are hereby authorized to use this contract in accordance with the terms and conditions set forth herein.
>
> **Formation of this contract does not preclude the Government from using any Agency or Agency Cooperator owned resources before National Contract Engines (NCE's)**

(Exhibit E at 233 (¶ D.1).) None of the changes are underlined or otherwise specified as being revisions.

15. These contract modifications alter paragraph D.10 (FF 5). As revised, the clause includes the following

> **D.10 DISPATCHING/ORDERING PROTOCOL FOR EMERGENCY INCIDENT RESPONSE**
>
> **A. National Mobilization Guide Ordering Protocol for National Contract Engines:**
>
> Each Host Unit Dispatch Center must give dispatch preference during the Mandatory Availability Period to its assigned NCE for emergency wildland fire suppression and severity (which includes fire readiness) missions BEFORE EERA, and all other private resources not on the

> National wildland fire engine contract(s). Existing Agency/ Interagency contracts awarded prior August 2002 where a prior firm commitment has been established are exempt from this protocol.
>
> **Formation of this contract does not preclude the Government from using any Agency or Agency Cooperator owned resources before National Contract Engines**
>
> **Note: The acronyms NCE (National Contract Engine) and NCR (National Contract Resource) may be used interchangeably in this specification.**
>
> **Practical Application:**
>
> - The above preference in dispatch priority pertains to the Mandatory Availability Period only.
>
> . . . .
>
> - Host Unit Dispatchers will make every effort to honor the ordering protocols herein, and shall (to the extent practical) document when these protocols are waived.
>
> - It is the intent of this contract that the first priority of use of the NCE resource is emergency fire suppression (to include severity). However, the NCE may accept orders for project work during the Mandatory Availability period. When project work is accepted, the NCE will loose [sic] their place in the dispatch rotation until the project work is completed (see Exhibit E).
>
> . . . .
>
> **B. Host Unit Assignments**
>
> Each NCR is assigned to a specific Host Unit. The Host Unit Dispatch Center is responsible to status each assigned NCE, however it is the duty of each NCE to report all changes in availability and position to the assigned Host Unit Dispatch Center within the mandatory availability period (MAP). Outside the MAP the NCE is not required to report availability and positions (status) the Host Unit Dispatch Center, however, the Host Unit dispatcher is not required to spend time locating the NCE when needed if the NCE's status is not reported.

(Exhibit E at 236-37.) These modifications also redesignate and change the language in the Replacement clause (FF 7 (¶ D.10.G); Exhibit E at 238-39 (¶ D.10.E)).

16. With effective dates of December 18, 2003, the Forest Service issued contract modifications, thereby extending the contracts for option period 2, covering the period from January 1, through December 31, 2004. The modifications do not indicate or reference an allocation of additional money under the contract. (Exhibit E at 303.)

17. With effective dates of April 12, 2004 (Exhibit E at 215), the parties bilaterally (the modifications required the signature of the contractor) modified the contracts. The Forest Service issued the modifications with the stated purpose "to change some contract specifications and contract clauses" and to incorporate updated wage determinations. The modifications alter the Replacement clause (¶ D.10.E). (Exhibit E at 304, 307.) The modifications specify that there is no change in the total potential contract value as a result of the modifications; the modifications are silent on any price adjustment under the Changes clause or other contract provision that may arise from the modifications (Exhibit E at 304).

18. During the life of the contract, the host unit obtained the services of engines other than those of these contractors. Some orders were placed with what the Forest Service describes as volunteer fire departments, under cooperative fire protection agreements entered into in 2003 or 2004. However, the services were not "volunteered"; the Forest Service provided compensation for the services utilized. (Exhibit H; FF 24.)

19. The orders placed under each contract total in excess of $10,000. (Complaint at 2-3 (¶ 15); Answer at 2 (¶ 15).) The Forest Service did not adjust, i.e., extend, the mandatory availability period under these contracts.

The disputes

20. By letter dated April 8, 2005, to the Forest Service, the contractors made a joint submission of their certified claims. The contractors seek to be paid for what they contend is a guaranteed minimum of $10,000 for the base year of the contract (July 18, through December 31, 2002, encompassing only one, not both, mandatory periods of preference). Having received no orders during 2002, Rock Hill, Support Fire, and First Strike each seeks $10,000; Red Rock seeks $4,750 (having received orders totaling $5,250 during 2002). The contractors also assert that the Government violated the dispatch/ordering protocol provisions of the contracts when placing orders in years 2002, 2003, and 2004, with local fire departments under emergency equipment rental agreements and cooperative agreements for task orders/delivery orders. The claim maintains that local fire departments under cooperative agreements are not agency cooperators and, therefore, do not have preference under the contracts over the national contract engines. The contractors contend that in the Superior National Forest alone, the Forest Service placed orders with others than these contractors and in violation of the contracts. The contractors categorize their damages, based on available information (with no specific dollars attributed to 2002), as follows:

2003 MAP violations	$135,381.00
2004 MAP violations	$ 36,020.00

2003 non-MAP (lack of consideration)	$ 11,482.50
2004 non-MAP (lack of consideration)	$101,620.50
TOTAL	$284,504.00

To determine the amount of each contractor's claim, the contractors apportion this total based upon the number of engines each had under contract out of the total of nine. (Exhibit F at 359-65.)

21. By letter dated April 29, 2005, a contracting officer (different from the awarding contracting officer and his successor) issued a decision denying the claims. The decision quotes the provisions from the contracts (FF 8), and states: "Please note the wording **does not** state that $10,000 would be paid each year the contract was extended, but during the **life of the contract** which includes the **base year and two option periods** which may or may not be exercised by the Government on a unilateral basis." The contracting officer also concludes that the Government placed orders pursuant to the terms and conditions of the contract, and did not deprive the contractors of any orders. The contracting officer relies upon the definitions in the initial contract (FF 3), and language in the modifications, including the variations in the replacement clause (FF 14, 15, 17), although there is no finding that ties that clause to the orders at issue. (Exhibit F at 367-69.)

Additional information in the evidentiary record

22. The president of one of the contractors avers in a declaration that in the spring of 2000 he attended an association meeting at which the awarding contracting officer and a director discussed the then upcoming solicitation. In particular:

> Most of us at the meeting, having been in business for many years providing engine resources, and competing for resource orders among other companies and agencies, the question was posed, who was considered an Agency resource? A direct answer was provided; that Agency resources were the five federal fire agencies. That even the state agencies would not have preference over the contract on federal jurisdiction lands. Additionally, a $10,000 dollar annual guarantee would be offered to cover the vendors[']expenses and provide some payment for the mandatory availability requirement. It was expressed by [the then and eventual awarding contracting officer], that this was an IDIQ contract but with a requirement component.

(Contractors' Response and Motion, Attached Declaration at 2-3.)

23. In a declaration supplied by the contractors, the awarding contracting officer expressly addresses the guarantee under the contracts. Noting that $100,000 per contract per year that he initially sought was not available, the individual indicates that "business value" (i.e., consideration) was offered in the dispatch priority placing contractors ahead of any other private sector engines. The individual states that at industry conferences he emphasized that this was a best value procurement, with awards not necessarily going to the lowest priced, but to companies "that had the

financial resources to be available, especially during the Mandatory Availability Period (MAP). To make this attractive to this higher caliber group of contractors, the solicitation mandated that they would have a guaranteed preference during the MAP." The individual does not state or imply that, in the period after the solicitation was issued and before award, he indicated that the Government guaranteed to place a minimum total of orders of $10,000 during the base year as well as each option year of a contract. That is, there is no statement that the awarding contracting officer (or any Government official) conveyed an interpretation of the guarantee provision or reached an understanding that was not fully conveyed in the actual language of the request for proposals and contracts. (Contractors' Response and Motion, Attached Declaration.)

24. In a declaration supplied by the Department, an employee of the USDA Forest Service, in the Eastern Region, serving as Supervisory Contract Specialist for the Superior and Chippewa National Forests since 1998, states:

> An agency cooperator is defined as "[a]n individual or entity that voluntarily desires to cooperate with the Forest Service on a project and is willing to formalize the relationship by entering into a memorandum of understanding or other agreement." FSM [Forest Service Manual] 1580.5 The Superior and Chippewa National Forests used Emergency Equipment Rental Agreements (EERAs) to formalize the cooperative relationships between the Forest Service and local Fire Departments (LFDs) until the end of 2002. After 2002, the Superior and Chippewa National Forests formalized the cooperative relationships through Cooperative Fire Protection Agreements (Cooperative Agreements). Attachment A.
>
> 4. It is my understanding that most of the local Fire Departments are members of the Minnesota Fire Chief's Association and are therefore Agency Cooperators under the Minnesota Interagency Fire Center Agreement (MNICS). Attachment B.
>
> 5. From April 7, 2003 to June 29, 2004 the Superior National Forest executed 30 Cooperative Agreements with LFDs exactly like or similar to the one attached as Attachment A. See also Attachment C.
>
> 6. From April 28, 2003 to May 11, 2005 the Chippewa National Forest executed 11 Cooperative Agreements with LFDs exactly like or similar to the Cooperative Agreement attached as Attachment A. See also Attachment D.

(Department Motion, Exhibit 2 at 1-2 (¶¶ 3-6).) The submission does not include a copy of the referenced Forest Service Manual, or an explanation of why that definition is applicable to these contracts. The contractors maintain in their response that the individual adds the word "agency" to the FSM definition of cooperator (Contractors' Response at 21).

DISCUSSION

The Board shall render summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 255 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56; Mangi Envtl. Group, Inc., AGBCA Nos. 2005-101-1, et al., 06-1 BCA ¶ 33,233, at 164,691.

The contractors contend that (1) the contracts guarantee orders totaling a minimum of $10,000 in the base year of the contracts; (2) the Government failed to honor contractual ordering preferences during the mandatory availability period; and (3) the Government failed to consider the contractors on days outside of the mandatory availability period. For each of these alleged violations, the contractors seek relief.

The Department seeks summary judgment on each of the three issues, asking the Board to deny each aspect of each claim. The contractors both oppose the Department's motion and move for summary judgment on the allegation that the Government placed orders in violation of the ordering clauses of the contracts.

Minimum guarantee

The Department maintains that the contracts assure that orders will be placed totaling a minimum of $10,000 over the life of the contract, without treating each contract year (base year and option years) separately. The contractors contend that the contracts guarantee a minimum payment of $10,000 per year for each year of the contract (base year and each option year).

As solicited and awarded, the contracts state:

> During the life of this contract (base year, plus any option year), the Government shall place orders totaling a minimum of $10,000 , but not in excess of $5,000,000 . (Also see D.10 for ordering protocol, supplied as consideration having significant business value).

(FF 8.)

The starting point for contract interpretation is the language of the contract. The plain meaning of the given language resolves this dispute; there is no need to resort to extrinsic evidence. Coast Federal Bank v. United States, 323 F.3d 1035, 1038 (Fed. Cir. 2003); Thomas Creek Lumber & Log Co., IBCA No. 3917R-3921R-2005 (July 20, 2006). Summary judgment is compelled. The contracts specify that during the life of the contract the total orders placed shall be at least $10,000. The life of the contract is not each individual year, but the base year plus each and any option year exercised. The minimum dollar amount reflects the total of the orders to be placed under the contract. There is no guarantee for $10,000 per year.

The interpretation proffered by the contractors is not reasonable, as it requires the insertion of a phrase or notion absent from the existing language, so as to read, for example, "during the life of this contract (for the base year, plus for any option year)." No language in the solicitation or contract suggests that the Government will guarantee an annual level of ordering. As written, the guarantee relates to the total of orders under the contract, not the total during a given contract year. It is not reasonable to read more into the language than the language itself supports.

The contractors seek to utilize extrinsic evidence to establish the intent of the contractors and awarding contracting officer. This use of extrinsic evidence is inappropriate given the plain language of the contracts. Moreover, the references provided by the contractors are insufficient to establish a reasonable basis for a contrary interpretation and to avoid summary judgment. At best, the contractors relied upon oral statements made well in advance of the issuance of the solicitation. Such reliance upon oral representations (assuming the statements rise to such a level), is not reasonable when not supported by the actual solicitation language. The record does not suggest that at the time of award the parties shared a mutual interpretation that the minimum orders were to occur for each contract year. Significantly, the declarations of the awarding contracting officer and of a president of a contractor express no such understanding. In support of the use of extrinsic evidence, the contractors rely upon an inquiry in February 2003 (after the base year had been completed and the Government had not placed orders totaling $10,000 with any of these contractors) and the response of the awarding contracting officer sent in an e-mail after the completion of the base year ("send me a bill for the $10,000 now"). This exchange and other later communications are not contemporaneous with the time of award. There is no support for a shared interpretation at the time of award and no basis to deviate from the plain language of the contracts.

While the contractors attempt to make this issue a factually based question of interpretation, as they contend that the mutual intent of the parties was to ensure the $10,000 minimum for each year of the contract, the record contains no substantive basis to reach such a conclusion. First, there is the plain language of the contract. Second, the contractors reference nothing in the evidentiary record that purports to place that interpretation upon the Government at the time of contracting. The Board grants this aspect of the Department's motion for summary judgment and denies this basis of the claims.

Orders placed within the mandatory availability periods

The Department maintains that, in obtaining engine resources, the host unit did not violate the terms and conditions of these contracts, as awarded or as modified. The contractors contend that the host unit placed orders with entities other than these contractors, and that such orders were placed in violation of these contracts, thereby entitling these contractors to relief.

Under the awarded contracts, the contractors were assured of obtaining orders from the host unit during the mandatory availability period ahead of various other sources, but not agency resources (resources of five named entities, seemingly not here at issue) and agency cooperators (defined as taxed based entities available through cooperative agreements to assist the Forest Service) (FF 3).

As awarded, the contracts dictated that each host unit "must give dispatch preference to assigned NCR resources BEFORE EERA, and all other private resources not on the National Engine Contract except for other Government contracts where a prior firm commitment has been established." (FF 4, 5, 7). Thereafter, contract modifications altered various terms and conditions of the contracts (FF 12-15, 17).

At this stage, the parties have opted not to submit this issue on the existing written record. Rather, the Department and contractors each seek summary judgment, which requires the Board to make factual assumptions in favor of the non-moving party, should material facts not be conclusively demonstrated in the existing record.

Neither party has demonstrated that the resources the agency utilized instead of these contractors were or were not agency cooperators or otherwise permitted or prohibited under the contracts. The agency has alleged without proof that the local fire departments are tax based entities falling within the definition of agency cooperator. The contractors have not demonstrated that each of the utilized volunteer or local fire departments was not an agency cooperator or was otherwise retained in violation of these contracts. The factually based legal questions of the status of the fire departments and underlying agreements remain in dispute. Beyond these conclusions, the Board addresses some of the allegations made by the parties and provides comments in an attempt to focus issues and assist in the development of the record for resolution.

It is difficult, if not impossible, to reconcile some of the positions of the Department with the language of the contracts, as awarded and as modified. The host unit obtained the services of engines from other than these contractors during the mandatory availability periods. The Forest Service utilized what it labeled cooperative agreements (FF 18, 24). The contracts define agency cooperator as a tax based entity available through cooperative agreement to assist the Forest Service (FF 3). As stated above, the existing record does not demonstrate that the agreements were made with "tax based entities." Under the definition of cooperator from a Forest Service Manual, as supplied by the Supervisory Contract Specialist, a cooperator is one who "voluntarily desires to cooperate." The engines obtained under the labeled "cooperative agreements" were not volunteered; the agreements dictate that the Forest Service must compensate the party to such an agreement. (FF 18.) A difficulty in adopting the encompassing definition of agency cooperator proffered by the Department is that the stated preference appears to disappear fully. Such an interpretation that renders meaningless the stated preference, particularly when that preference is designated as substantive consideration for the contracts, is not favored if a different interpretation gives meaning to the contracts read as a whole.

In 2003 and 2004, the Forest Service both modified the contracts here at issue, and entered into "cooperative fire protection agreements" with non-contractor resources. The referenced agreements with fire departments both post-date these contracts and do not represent firm commitments to provide resources (FF 18, 24). When the evidentiary record is closed, the Board will be in a position to determine if the host unit acted in accordance with the terms and conditions of these contracts, as awarded and amended. The existing record does not provide a basis to distinguish the various

agreements with the fire departments from Forest Service emergency equipment rental agreements (EERAs), particularly when it appears that the Forest Service had been obtaining the same resources through EERAs at the time these contracts came into existence (FF 24). A new label (cooperative agreement instead of EERA), is not a distinguishing factor; a substantive difference must be established. Thus, one could conclude that at the time of award, the parties understood that these contractors would have a preference over the resources of the volunteer and local fire departments.

The contracting officer concluded that the bilateral modifications, which altered contractual language, preclude the requested relief. This determination is not borne out by the existing record. That is, the contracts, as awarded, provided explicit preference for the selection of these contractors ahead of other resources. The Forest Service materially altered pertinent provisions of the contracts after award. It has not been demonstrated that the bilateral modifications were intended to preclude contractors from seeking relief for the changes seemingly dictated by the Forest Service. To the extent that the modifications alter that preference, which is a benefit to the contractors (i.e., consideration), the modifications do not preclude the contractors from seeking relief for the changes in terms and conditions. Further, these contractors maintain that the selection of other resources violated the terms and conditions of the contracts, both as awarded and as modified. If proven, these allegations would constitute compensable breaches or changes.

Relying upon language in the 2003 modification (the Forest Service "and its cooperators, i.e., the Bureau of Land Management, Bureau of Indian Affiars, Fish and Wildlife Service, and the National Park Service" (FF 14)), the contractors seek a determination that the fire departments were not any of the identified cooperators, such that the Government improperly placed orders. The suggested interpretation equates the phrase "agency cooperator" with "agency" and "Government," despite the express, distinct definitions in the modification. Further, the modified clause also specifies that "work may be performed for any USDA Forest Service or cooperating Government or State Agency requiring the use of an engine." (FF 13, 14.) The phrase in the clause referenced by the contractors is consistent with this provision, as it identifies the cooperating Government agencies. The Board declines to adopt the interpretation offered by the contractors; the interpretation is unreasonable in the context of the contracts.

Orders placed outside of the mandatory availability period

Outside of the mandatory availability period, the Government was authorized, but not obligated, to place orders under these contracts (FF 7). As awarded and variously amended, the language of the contracts expressly indicates that any ordering protocol and preference applies only to the mandatory availability period (FF 4, 5, 14, 15). Further, outside of the mandatory availability period, a contractor was not obligated to accept any order for services, such that consideration was not exchanged for any orders not placed in the mandatory period (FF 6, 13). Therefore, the Government did not breach these contracts by its placement of orders with other entities outside of the mandatory period. The Board grants the Department's motion for summary judgment regarding this issue, denies the contractors' motion for summary judgment regarding this issue, and denies the related aspects of the appeals.

DECISION

As detailed above, the Board grants in part the Department's motion for summary judgment, and denies the motion for summary judgment of the contractors and particular aspects of the claims.

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JOSEPH A. VERGILIO
Administrative Judge

Opinion by Administrative Judge PARRETTE.

I concur. I am sympathetic as to the issues raised by Judge Pollack, and I agree that summary judgment would not be appropriate if the language of the contract were ambiguous. However, I do not think the language is ambiguous. Thus, the contract language prevails.

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BERNARD V. PARRETTE
Administrative Judge

Opinion by Administrative Judge POLLACK, concurring in part, dissenting in part.

I agree with Judge Vergilio as to his conclusions regarding the responsibilities of the Department regarding the ordering of work during the mandatory availability period and the ordering of work outside of the mandatory availability period.

I, however, respectfully disagree with granting summary judgment on the matter of the value of the $10,000 guarantee for the base and option years. Appellants contend that they interpreted the "life of the contract," to mean there was a $10,000 guarantee for the base year and a $10,000 guarantee for each succeeding option year exercised by the FS. In contrast, the FS concludes that the contract provides for a single $10,000 guarantee, regardless of whether the contract runs for just the base year or whether it runs 3 years (the FS exercising the two options). While I recognize that the engine running the contract is the opportunity for Appellants to be first in line for securing work and not the yearly guarantee of $10,000; at least on the record currently before the Board, I find it illogical that the parties expected the contractor to accept the same sum, whether obligated for 1 or 3 years. Moreover, often, base years and option years are treated in many respects as separate contracts. Given those concerns, and others set out below, I find that other facts put forth by the Appellants raise questions as to whether the language in dispute is subject to multiple interpretations and as such is ambiguous.

Where language is absolutely clear, the plain meaning prevails. I, however, do not find the language in issue here to be so clear, absent further amplification. I find that depending on the development and weight given to facts, among which are: (1) the logic of the meaning urged by the FS in the context of the fire suppression industry; (2) statements made in industry conferences (prior to award) by FS officials indicating the Government's understanding of the wording to mean that $10,000 on these contracts was to be paid for each year; and (3) statements made during the contract by a FS contract specialist, where she arguably interpreted the wording in a manner similar to Appellants; a tribunal could conclude that the language is reasonably susceptible to Appellants' interpretation and is therefore ambiguous. Our role here is not to weigh the evidence. Rather, we take the dispute with all reasonable evidentiary inferences in favor of Appellants. Where, as I find here, that might allow for a possible finding in Appellants' favor, the granting of summary judgment is not appropriate.

I do point out that among the declarations filed by Appellants is one from the awarding contracting officer. That former CO was identified in a declaration filed by the president of one of the Appellants seeking relief, as a FS official who supported the Appellants' reading. Nothing in that CO's declaration, however, addresses the matter of the $10,000. I find that to be troubling. However, the matter is before the Board on summary judgment and as such, being all reasonable inferences are to be made in favor of the Appellants, the statements by that president (while not corroborated as to the CO's confirming interpretation) are adequate to establish that disputed fact.

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HOWARD A. POLLACK
Administrative Judge

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